Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROBERT HADEN KING, JR.,
Petitioner,

v.

NEIL BROWN, SUPERINTENDENT,
CLALLAM BAY CORRECTIONS CENTER,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals on habeas review erred by failing independently to review the state court's determination of petitioner's competency to withdraw from a plea agreement after the full performance of his obligations under the agreement when the state court had not applied the constitutionally mandated standard to its findings of fact.

2. Whether the allocation of the burden of proof expressed in 28 U.S.C. § 2254(d)'s "presumption of correctness" trumps the requirements for holding a federal evidentiary hearing mandated by this Court's decision in *Townsend* v. *Sain*.

3. Whether a superseding indictment may extend the strict time limits established by the Interstate Agreement on Detainers within which a prisoner must be brought to trial.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Haden King, Jr. hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 8 F.3d 1403 (9th Cir. 1993) and is included in the Appendix at pp. 1a-26a. The order of the district court adopting the findings and recommendation of the magistrate judge is not reported and is included in the Appendix at pp.

27a-28a. The findings and recommendation of the magistrate are included in the Appendix at pp. 29a-40a.

JURISDICTION

The decision of the court of appeals was entered on November 3, 1993. Rehearing was denied on March 11, 1994. App. 41a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1.

28 U.S.C. § 2254(d) is included in the Appendix at p. 42a.

The Interstate Agreement on Detainers, codified by Oregon at Or. Rev. Stat. § 135.775, is included in the Appendix at pp. 43a-51a. The statute is also found at 18 U.S.C. app. § 2.

STATEMENT

Something is rotten in Oregon. In return for petitioner's substantial and life-threatening cooperation in testifying repeatedly against a reputed organized crime figure, the state agreed to limit petitioner's sentence after a guilty plea to a ten-year term concurrent to his current confinement. Petitioner fully satisfied each of his obligations under the agreement. Nevertheless, the state revoked the plea agreement and petitioner was convicted and sentenced to at least 30 years of imprisonment *consecutive* to his current confinement. The state justified this revocation on the ground that, despite his full performance, petitioner had not formally entered his plea. The majority below up-

held his conviction because, at the time the state trial court deemed petitioner to have withdrawn from the guilty plea, he was presumptively "competent," notwithstanding that he could not possibly have benefitted by refusing to plead guilty.

The divided holding of the court of appeals denying habeas relief in this case, which presumed that the state court's determination of competency was correct, conflicts with the holdings of three other courts of appeals and decisions of this Court stating that such a presumption is not appropriate on this legal issue. The decision of the court of appeals also conflicts in two other significant respects with the decisions of various courts of appeals. For these reasons, the decision below warrants review by this Court.

A. Factual Background

Petitioner has been incarcerated in a state penitentiary in Washington since 1982. Late in 1982 Oregon moved pursuant to the Interstate Agreement on Detainers ("IAD") to have petitioner sent to Clackamas County, Oregon, for the purpose of standing trial for the murder of Julie Salter, the ex-wife of James Salter, a Seattle attorney with reputed connections to organized crime. James Salter was alleged to have hired petitioner to arrange for the murder of Salter's ex-wife. Unaware that the Oregon indictment had been obtained in knowing violation of Oregon's constitution, the state of Washington transferred petitioner to Oregon.

Petitioner and the state of Oregon entered a plea agreement on August 3, 1983. Petitioner agreed to cooperate with the investigation into Julie Salter's murder and to testify against James Salter or any other person whom the state might indict in connection with its investigation. In exchange for this substantial assistance by petitioner, the state agreed to

> allow the defendant to enter a plea of guilty to the charge of murder with the understanding that the

> defendant will receive a life sentence with an order that he serve a minimum of ten years before being eligible for parole, and that said sentence will run concurrent to any sentence the defendant is now serving.

Exh. 110, App. 53a.[1]

Petitioner's agreement to testify against James Salter was reported widely in the media in Oregon and Washington. Exh. 42 at 1 - 236. Petitioner's life immediately was threatened, both from inside and outside the correctional system. As a result, the Clackamas County Sheriff's Department was forced to take the most extreme security measures it had ever implemented in its attempt to protect petitioner from being killed. Motion for Reconsideration before the District Court, Exh. B (filed Mar. 20, 1992). Among other things, the Sheriff's Department prohibited anyone but his attorneys from visiting petitioner for all but two hours every week. *Id.* at 5 (Clackamas County Sheriff's Department directive, Dec. 15, 1983). It also required petitioner to wear a bulletproof vest every time he left the jail, which was three miles from the courthouse. *Id.* at 4 (directive, Dec. 16, 1983). When in transit to and from the jail, petitioner was disguised to conceal his identity and transported by different routes. *Id.* at 15 (affidavit of Deputy Sheriff Ronald Crader, Apr. 25, 1984). Everywhere petitioner went, he was always accompanied by large number of deputy sheriffs. *Id.* at 18 (affidavit of Deputy Sheriff Gary Sizemore, Apr. 3, 1984). The Sheriff's Department did not consider even his cell to be safe and had armored plates welded over his cell windows as well as those nearby. One deputy sheriff, who personally had received a threat to petitioner's life while off duty, stated that even he was "highly alarmed" and "paranoid" as a result. *Id.* at 12 (affidavit of Deputy

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[1] In conformity with the opinion of the court of appeals, the state court record is referred to by exhibit numbers, ("Exh. ——"), since the record was designated as "exhibits" before the district court on habeas review.

Sheriff Tim Finch, Apr. 25, 1984). As Judge Pregerson explained, the threats and security precautions no doubt "exacerbated" petitioner's emotional problems and left petitioner in a "precarious mental state." App. 26a.

Nonetheless, in reliance on the plea agreement, petitioner began performing his side of the bargain and cooperated completely with the state. Petitioner met with state investigators and provided them with information about Julie Salter's murder. In December 1983, petitioner testified against James Salter before a grand jury. Salter was indicted and petitioner testified at his bail hearing in January 1984.

Petitioner was more susceptible to pressures than an ordinary inmate because he had suffered a significant brain injury as a result of an airplane crash in 1979. Petitioner had required extensive psychiatric care since then, both in his home state of Alabama in 1979, and in Washington thereafter. To ameliorate the effects of his brain injury, petitioner was taking the following prescription medications: Tegretol, an anticonvulsant; Dilantin, an antiepileptic; Haldol, an antipsychotic; and Lithium. The circumstances surrounding his appearance as state's witness exacerbated petitioner's existing mental condition. He became convinced that if he were released into the general prison population in either Washington or Oregon he would be killed immediately as a "snitch." As a result, he requested permission to serve his sentence in the prison system of Alabama where the vast media coverage of the Salter trial was less threatening.

In late February 1984, shortly after testifying against Salter at his bail hearing, petitioner, in despair, stopped taking his medications and sent the Clackamas County Court a handwritten note seeking to represent himself and to discharge his attorneys, claiming they had put his life in jeopardy. Specifically, petitioner sought to withdraw from all "life endangering" plea agreements. When asked by the court to explain his request, petitioner complained

that his attorneys had not been able to arrange for his transfer to Alabama after he had finished testifying against Salter. Counsel at that time informed the court that petitioner was no longer taking his medication.

The court then ordered Dr. Parvaresh, a board-certified psychiatrist, to examine petitioner to determine his competency to represent himself. Dr. Parvaresh informed the court that, as a result of his underlying psychiatric disorder, petitioner was not competent to represent himself, stand trial, or assist in his own defense. Exh. 111, App. 57a-58a. Specifically, petitioner was "emotionally and mentally confused and disorganized" and suffered from "paranoid ideation" directed at those around him, including his attorneys. *Id.* at 57a.

The state then moved to have petitioner examined further at the Oregon State Hospital. While this motion was under consideration, petitioner attempted to commit suicide by hanging himself with a mattress cover, but a Sheriff's Deputy cut him down and resuscitated him. Brief on Motion for Reconsideration before the District Court at 6, Exh. 2H (filed May 18, 1992). On March 12, 1984, the court, finding "reason to doubt defendant's fitness to proceed," agreed to the State's request and sent petitioner to the state hospital in Salem. A physician there determined that petitioner had an organic personality syndrome as a result of the airplane crash and had suffered a marked change in his personality that affected his emotions, attitudes, behavior and social judgment. Exh. 119 at 489-90. Nevertheless, the physician, a long-time family doctor who had completed a three-year psychiatric training program, noted that petitioner's memory was intact and that he could understand court procedure, and concluded that petitioner was competent "to aid and assist in his own defense." *Id.* at 493. This conclusion was reached after conducting less than an hour of interviews. *Id.* at 497-98.

During the one-week period petitioner was away from the relatively secure environment of the Clackamas County

jail and in the general hospital population, a prisoner attempted to kill him. Petitioner was stabbed in the eye with a pencil for being a "snitch." Motion for Reconsideration before the District Court, Exh. B at 33 (filed Mar. 20, 1992); Exh. 119 at 496.

After this attack, Dr. Larsen, another board-certified psychiatrist who had previously examined petitioner, examined him on successive days. Dr. Larsen concluded that petitioner was continuing to refuse medication and was actively psychotic, consistent with the conclusion reached by Dr. Parvaresh. Exh. 112 App. 59a-62a. He found that petitioner's insight and judgment were impaired and that he was highly paranoid. *Id.* at 61a. He also noted that petitioner suffered from paranoid ideation directed against his attorneys. *Id.*

Despite the threats to and the attempt on his life and the unresolved status of his competency, the state insisted that petitioner continue to perform his part of the plea bargain so that it could successfully prosecute Salter. The court continued petitioner's competency proceedings during this period. In April 1984, petitioner spent three days on the stand, two under cross-examination, testifying against Salter at his trial. The toll on petitioner, however, continued to be great, and on May 4, 1984, he once again attempted suicide. Motion for Reconsideration before the District Court at 3 (filed May 1, 1992). On May 10, 1984, despite petitioner's best efforts, Salter was acquitted.

Petitioner's competency proceedings resumed in May 1984, and on May 31, 1984, the court found petitioner competent to stand trial. Exh. 119 at 519. Despite having performed fully his end of the plea agreement, petitioner did not enter a formal plea of guilty at this time. As a result, despite the fact that the state had agreed to *allow* petitioner to enter a plea of guilty and had not set any particular time for the plea, it asked the court to find that petitioner had withdrawn from the plea agreement.

Id. at 520. One of petitioner's attorneys, Michael Clancy, specifically appointed to assist petitioner in the prison transfer process, asked the court to delay ruling on the state's motion to allow the Alabama Parole Board time to consider petitioner's request for a transfer. *Id.* at 525. Clancy hoped that if the custody issue could be resolved, petitioner then would be able to make an "intelligent" decision about whether to enter a guilty plea. *Id.*

There was absolutely no rational basis for petitioner to go to trial. If the state accepted petitioner's guilty plea as required by the plea agreement, petitioner would return to Washington to serve out his substantial, but concurrent sentence there. On the other hand, if petitioner went to trial, the best he could hope for was an acquittal that would achieve precisely the same result—a return to Washington to serve out the remainder of his sentence there. However, if he lost at trial, he faced the prospect of serving a life term in Oregon *in addition to* completing his Washington sentence. Petitioner's mental defect, exacerbated by his failure to take medication and his fear of repercussions following his testimony against Salter, rendered him incompetent to withdraw from the plea agreement.

Nevertheless, the court refused petitioner's request and entered an order "relieving the State from any obligation that was originally involved in the plea agreement" because petitioner had not yet entered a guilty plea. *Id.* at 526-27. A few weeks before the trial began, petitioner attempted to enter a guilty plea but the court refused to enforce the plea bargain.

Having refused petitioner's tender of a guilty plea as provided by the plea agreement, the state took him to trial. Petitioner was convicted of aggravated murder and was sentenced to life imprisonment with a minimum of 30 years before eligibility for parole. The sentence was to run *consecutive* to his Washington incarceration. In addition, petitioner was ordered to reimburse the state

$96,500 for the expenses of his defense. Petitioner was then returned to Washington. The state of Washington immediately sent petitioner to Alabama, where he remained in protective custody for 18 months before being returned. Petitioner appealed his Oregon conviction and exhausted all state remedies. See *State* v. *King*, 733 P.2d 472 (Or. Ct. App. 1986), *review denied*, 737 P.2d 1248 (Or. 1987).

B. Proceedings Below

Petitioner filed a petition for habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the District of Oregon on April 3, 1990. Petitioner alleged that the state (1) violated the Due Process Clause of the Fourteenth Amendment by failing to fulfill its obligations under the plea agreement after he had fully performed his part of the plea bargain, and (2) breached the IAD by securing a superseding indictment outside the time frame provided by that interstate compact.

In reference to the plea bargain, petitioner specifically asked the district court to decide whether (1) he was competent to withdraw from the plea agreement, (2) he was obligated by the plea agreement to enter the plea by a specific time, (3) the state had waived its objections to petitioner's failure to enter a plea by using his testimony at Salter's trial, and (4) the state had been prejudiced in any way by petitioner's equivocation about the plea agreement.

Petitioner's habeas petition was referred to a magistrate judge. The magistrate judge determined that petitioner could not invoke the district court's habeas jurisdiction on his plea agreement claims and that the IAD's provisions had not been violated. App. 38a-40a. Ignoring entirely the fact that petitioner's life had been threatened repeatedly as a result of his compliance with the plea agreement, the magistrate judge reasoned that petitioner's due process rights had not been prejudiced because he had not been denied his right to a fair trial. Accord-

ingly, the magistrate judge recommended that the state's motion to deny relief be granted and the petition be dismissed without addressing petitioner's plea agreement claims on the merits or considering his request for an evidentiary hearing. *Id.* at 39a n.4. The district court adopted the magistrate judge's findings and recommendation in a brief order. *Id.* at 27a-28a. Nonetheless, on May 19, 1992, the district court issued a certificate of probable cause under 28 U.S.C. § 2253 and petitioner appealed the dismissal of his habeas petition to the court of appeals.

A divided panel of the court of appeals affirmed, but on a basis different from the district court's jurisdictional holding. Without the benefit of a federal evidentiary hearing, the majority addressed the merits of what it incorrectly thought petitioner's argument "appear[ed] to be." App. 12a. The majority applied the "presumption of correctness," 28 U.S.C. § 2254(d), to the state court proceedings on the plea agreement, including the determination of petitioner's competency, App. 10a-11a, and made additional appellate findings based on the Restatement (Second) of Contracts, *id.* at 12a. It then concluded that the state court's determinations had been within the "broad bounds of reasonableness" required by this Court's decision in *Ricketts* v. *Adamson*, 483 U.S. 1 (1987). App. 12a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit, by slavishly abiding by the state court's competency assertion, has decided an issue of fundamental importance to criminal justice in direct conflict with the decisions of at least three other courts of appeals and decisions of this Court. While the basic historical facts underlying a state court's decision concerning an accused's mental competency are subject to deference on collateral review, a federal court exercising habeas jurisdiction in the Sixth, Tenth, and Eleventh Circuits is obligated to make certain that the state court has applied the constitutionally mandated legal standard of competency. The panel in this case consciously abdicated that responsibility. Accordingly, this case presents the Court with a perfect opportunity to clarify the Court's decisions that underlie the circuit split of authority as to the factual and legal nature of the competency determination.

Additionally, the Ninth Circuit's treatment of petitioner's habeas petition ignored the federal district court's fundamental obligation to review the properly presented claims of a state prisoner held in violation of the Constitution and of federal law in direct contravention of the decisions of this Court. While Congress and this Court have reformed the law of habeas corpus to protect the integrity of the writ, the decision of the Ninth Circuit renders the writ a total nullity by rubber-stamping the state court's decision and denying petitioner the opportunity to develop and present his claims in a federal forum as provided in 28 U.S.C. § 2254. Finally, the Ninth Circuit's determination that a superseding indictment tolled the speedy trial deadline of the IAD conflicts with the decisions of every other court to address the issue.

1. The Ninth Circuit's decision on mental competency in this case directly conflicts with the decisions of at least three other courts of appeals. It also conflicts with the proper interpretation of this Court's own decisions.

a. The Ninth Circuit relied on the fact that the state court had found petitioner competent. App. 10a-11a. In so doing, it followed the settled rule in that circuit that " '[a] finding on the issue of competence is a finding of fact.' " *Id.* (citing *Brewer* v. *Lewis*, 989 F.2d 1021, 1030 (9th Cir. 1993)). Relying on the language of 28 U.S.C. § 2254(d) indicating that issues of fact are entitled to a presumption of correctness, the court concluded that the state court's finding of competency must be presumed to be correct. *Id.* at 10a.

At least two other courts of appeals, however, directly have rejected such cursory treatment of the issue of competency as adequate to fulfill the federal court's obligations under habeas review. In *Price* v. *Wainwright*, 759 F.2d 1549 (11th Cir. 1985), the Eleventh Circuit held that "[t]he *ultimate* issue of competency has been treated as a mixed question of law and fact." *Id.* at 1551 (emphasis added). Likewise, the Sixth Circuit in *Levine* v. *Torvik*, 986 F.2d 1506 (6th Cir.), *cert. denied*, 113 S. Ct. 3001 (1993), held that "[a] number of courts have held that the question of mental competency is a mixed question of law and fact. We agree." *Id.* at 1514 (citations omitted).[2] A third court of appeals, the Tenth Cir-

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[2] *See also Card* v. *Singletary*, 981 F.2d 481, 484 n.6 (11th Cir. 1992) ("[w]hether one is competent to stand trial under the Fourteenth Amendment is a mixed question of law and fact"), *cert. denied*, 114 S. Ct. 121 (1993); *James* v. *Singletary*, 957 F.2d 1562, 1574 n.18 (11th Cir. 1992) ("competency to stand trial constitutes a mixed question of law and fact"); *Crockett* v. *Noles*, No. 89-5924, 1990 U.S. App. LEXIS 9523, at *13 (6th Cir. June 12, 1990) ("[t]he issue of competency is a mixed question of law and fact"); *cf. Dixon* v. *Jacobs*, 427 F.2d 589, 595 n.17 (D.C. Cir. 1970) (habeas case noting mixed nature of competency issue and distinguishing questions of fact and law). *But see Spitzweiser-Wittgenstein* v. *Newton*, 978 F.2d 1195, 1197 (10th Cir. 1992) ("[c]ompetency is a question of fact"); *cf. Griffin* v. *Lockhart*, 935 F.2d 926, 930 (8th Cir. 1991) ("we generally presume that a state court's factual finding of competency is correct"); *Flugence* v. *Butler*, 848 F.2d 77, 79 (5th Cir. 1988) ("the factual finding of competence is presumed to be correct").

cuit, while treating the issue of competency as a factual matter, nonetheless reviews *de novo* the standard of competency applied by the state court. *Lafferty* v. *Cook*, 949 F.2d 1546, 1550 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1942 (1992). Thus, while the determination of historical events and the credibility of their chroniclers clearly is a factual matter, the ultimate determination of competency remains, in significant part, a legal issue subject to *de novo* review in at least three circuits.[3] This split in authority by itself warrants review by this Court.

b. The Ninth Circuit's decision also conflicts in principle with this Court's decision in *Dusky* v. *United States*, 362 U.S. 402 (1960) (per curiam). In *Dusky* this

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[3] This Court's decisions are not to the contrary. In *Maggio* v. *Fulford*, 462 U.S. 111 (1983), this Court established that a state court's "*factual* conclusions" are subject to the presumption of correctness under 28 U.S.C. § 2254(d), when reviewed by a federal court exercising habeas jurisdiction. *Id.* at 117 (emphasis added). The court of appeals in *Maggio* had "substituted its own judgment as to the credibility of witnesses," *id.* at 113, and made its own factfindings on competency, rather than subjecting the habeas petitioner's claim to the more deferential evidentiary standard required by the statute. This Court specifically noted that the case did not involve any "dispute as to the proper legal standard to be applied" in determining competency. *Id.* at 116. Therefore, the application of the proper legal standard for competency is not a state court factfinding subject to the presumption of correctness.

In *Demosthenes* v. *Baal*, 495 U.S. 731 (1990), this Court addressed whether an inmate awaiting execution was competent when he waived his right to post-conviction relief. *Demosthenes* turned on the unremarkable general principle that "[a] state court's determinations on the merits of a *factual* issue are entitled to a presumption of correctness on federal habeas review." *Id.* at 735 (emphasis added). The *Demosthenes* Court divided over how to evaluate the "factual[ly]" "complex" evidence. *Id.* at 740 (Brennan, J., dissenting). No legal issues surrounding the competency determination were involved. Therefore, the Court was able to say that "a state court's conclusion regarding a defendant's competency" —in that case based on an exclusively "factual finding"—was "entitled to . . . a presumption [of correctness]." *Id.* at 735.

Court held that due process required an accused to possess (1) the "present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "a rational as well as factual understanding of the proceedings against him." *Id.* at 402. This Court specifically held that it was insufficient to find an accused competent simply because he had a factual understanding of his surroundings and was "oriented to time and place." *Id.* (internal quotations omitted).[4] In short, this Court determined that there is a legal—indeed constitutional—component to the determination of competency.

Here, the Ninth Circuit concluded that the determination of competency was a finding of fact entitled to a presumption of correctness without ever determining whether the state court applied the constitutionally mandated standard for competency. The Ninth Circuit ignored the distinction between law and fact and expressly adopted the state court decision *in toto* as if that decision involved only factual considerations. To make a competency finding, however, the state court was required by the Constitution to apply—at a minimum—the *Dusky* standard. See *Godinez* v. *Moran*, 113 S. Ct. 2680, 2688 (1993).

The state court, however, simply determined that petitioner was able to "understand[] the nature of the proceedings" and "able to participate in his defense." Exh. 119 at 518-19. It never found petitioner able to under-

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[4] This standard is equally applicable in habeas proceedings. *See, e.g., Godinez* v. *Moran*, 113 S. Ct. 2680 (1993). For decisions turning on the importance of a defendant's rational understanding in addition to a factual understanding, *see, e.g., Lafferty* v. *Cook*, 949 F.2d 1546, 1555 (10th Cir. 1991) (defendant "unable to make decisions on the basis of a realistic evaluation of his own best interests"), *cert. denied*, 112 S. Ct. 1942 (1992); *United States* v. *Hemsi*, 901 F.2d 293, 296 (2d Cir. 1990) (defendant's "impaired sense of reality prevented him from focusing on his legal needs and from acting effectively on his intellectual understanding").

stand rationally consultations with counsel or to have a rational understanding of the proceedings. Indeed, to the contrary, the court noted that petitioner had engaged in "bizarre behavior." *Id.* at 518; see also Order of June 4, 1984, App. 55a-56a. And, as noted above, the one physician who testified that petitioner was competent despite his mental defect, based his conclusion on petitioner's ability to recall past events and to follow court proceedings. Moreover, the evidence presented by the defense demonstrated that, regardless of whether petitioner factually could follow the proceedings, he certainly did not view them in a rational manner. See Exhs. 111, 112, App. 57a-62a.

The insufficiency of the trial court's finding is apparent from a comparison to the facts in *Dusky*. In *Dusky*, the examining physicians reported that the defendant was "oriented as to time, place, and person." 271 F.2d 385, 387 (8th Cir. 1959). The defendant understood the charges against him; he was in court, represented by attorneys; and he appreciated the consequences that could result from a conviction. *Id.* at 387-89. He was also able to give his attorney information about his past history. *Id.* at 389. Thus, Dusky would have satisfied the competency standard applied by the trial court in the instant case. However, because Dusky suffered from a mental defect and had auditory and visual hallucinations, was suspicious of those around him, and was depressed and fearful, even though on medication, *id.* at 387-89, this Court reversed Dusky's conviction based on the legally insufficient finding of competency. For precisely the same reasons, petitioner would not have been found competent under the *Dusky* standard. At a minimum, petitioner is entitled to an evidentiary hearing before the district court to fully explicate the merits of his claim of incompetence.

If this Court allows the Ninth Circuit's holding that the determination of competency is exclusively factual to stand, then state courts will no longer be subject to meaningful habeas review on the issue of the standard of

competency they apply. Instead, they will be free, as in this case, to disregard this Court's directives on the level of competency required by due process.

Allowing the Ninth Circuit decision to stand also will not diminish the federal courts' factfinding obligation. To the contrary, it will expand it. Under *Townsend* v. *Sain*, 372 U.S. 293 (1963), federal courts exercising habeas jurisdiction and determining whether to undertake evidentiary hearings must accept a petitioner's "*alleged* facts which, if proved, would entitle him to relief." *Id.* at 312 (emphasis added). Thus, a habeas petitioner alleging incompetence where there is no state court finding on the issue would obligate the federal court to accept *as fact* the mere allegation.[5] For all these reasons, this Court should review the decision of the Ninth Circuit to define and clarify explicitly the factual and legal nature of the determination of competency and resolve the conflict in the circuits embodied in the decision of the court of appeals below.

2. The decision of the Ninth Circuit to apply the "presumption of correctness" standard to petitioner's inchoate claims also is entirely inconsistent with the express guidance provided by this Court in *Keeney* v. *Tamayo-Reyes*, 112 S. Ct. 1715 (1992). The court of appeals, rather than discussing the district court's manifestly erroneous conclusion that it lacked habeas jurisdiction over petitioner's claims, proceeded to address the merits of petitioner's habeas petition in total disregard of the status of the petition and the arguments the parties raised before it. As a result, the court of appeals misapplied the presumption of correctness found in 28 U.S.C. § 2254(d), and deprived petitioner of the opportunity to present his habeas claim. In essence, the approach adopted by the Ninth Circuit ap-

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[5] In circuits viewing competency as a mixed question of law and fact, this effect is avoided. *See Card*, 981 F.2d at 484 & n.6.

plies the wrong standard of review and reviews the wrong record.

In *Townsend* v. *Sain*, 372 U.S. 293 (1963), this Court provided that a federal court has the power to hold evidentiary hearings if a habeas petition makes allegations that, if proved, would entitle the petitioner to relief. *Id.* at 312. In addition, *Townsend requires* federal courts exercising habeas jurisdiction to hold evidentiary hearings in the following circumstances:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.[6]

28 U.S.C. § 2254(d), on the other hand, specifies the *burden of proof* to be borne by the petitioner in habeas proceedings. If the state court has conducted a hearing "evidenced by a written finding, written opinion, or other reliable and adequate written indicia," then its factfindings are entitled to a presumption of correctness that the

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[6] The district court never addressed whether this Court's decision in *Townsend* required it to hold an evidentiary hearing. It is plain, however, that the district court would have been obliged to hold a hearing on the merits of petitioner's plea agreement claims. The merits of petitioner's claims were not resolved because the state court applied the incorrect legal standard for competency, regardless of whether competency itself is a mixed question of law and fact or is strictly factual. Even those courts of appeals that consider competency to be a factual matter permit federal evidentiary hearings on the application of the *Dusky* competency standard. *See, e.g., Lafferty*, 949 F.2d at 1549-50 & n.1.

petitioner must rebut *in a federal evidentiary hearing* by "convincing evidence." 28 U.S.C. § 2254(d). However, under certain circumstances, state factfindings are not entitled to a presumption of correctness. *Id.* § 2254(d)(1)-(7). Under these circumstances, the petitioner need only meet the "preponderance of the evidence" burden of proof to prevail. *Sumner* v. *Mata*, 449 U.S. 539, 550-51 (1981).

As this Court explained in *Keeney* v. *Tamayo-Reyes*:

> *Townsend* described categories of cases in which evidentiary hearings would be required. Section 2254(d), however, does not purport to govern the question of when hearings are required; rather, it lists exceptions to the normal presumption of correctness of state-court findings and deals with the burden of proof where hearings are held. *The two issues are distinct*, and the statute indicates no assumption that the presence or absence of any of the statutory exceptions will determine whether a hearing is held.

112 S. Ct. at 1270 n.5 (emphasis added).

The Ninth Circuit, however, ignored this distinction and fashioned an approach to dispose of petitioner's habeas request that deprived him of a meaningful opportunity to petition for habeas relief. The district court had done nothing more with petitioner's plea agreement claims than consider whether it had jurisdiction over them and had never afforded petitioner an opportunity to present any evidence.[7] The court of appeals then jumped to the conclusion that petitioner "ha[d] not presented evidence that he was incompetent at the time of the court's ruling sufficient to establish by convincing evidence that the state court's determination was erroneous." App. 10a. Not only did this approach deny petitioner the opportunity to present evidence, it also applied the heightened

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[7] *See* Rule 8(a) and accompanying Advisory Committee Note of the Rules Governing Section 2254 Cases in the United States District Courts.

"convincing evidence" standard to petitioner's allegations as if a Section 2254(d) federal evidentiary hearing had occurred.

This Court has never sanctioned the denial of a hearing prescribed by *Townsend* on the ground that Section 2254(d)'s presumption of correctness applied to the factual findings of a state court. The decision of the Ninth Circuit conflicts with this Court's decisions construing these two very distinct determinations. Therefore, the Ninth Circuit's adoption of an approach for reviewing habeas petitions that misapplies the presumption of correctness warrants this Court's review so that habeas petitioners are not denied relief even before they are afforded the opportunity fully to present their claims to the district court.

3. The Ninth Circuit also interpreted the IAD in a way that is inconsistent with the interpretations of all other courts to address the issue by holding that the filing of a superseding indictment extends the time period specified by the IAD within which a state may try a prisoner held in custody pursuant to that Agreement. Because of the importance of this issue, and because there is a conflict among the circuits and various state courts on how it should be resolved, this issue, like the other ones presented in this petition, should be resolved by this Court.

The IAD is an interstate compact among 48 states and the federal government governing transfers of prisoners for trials in other jurisdictions. Article IV of the Agreement provides that where, as in this case, a prisoner is transferred upon the request of a state in which an "untried indictment" is pending, "trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court . . . the court having jurisdiction of the matter may grant any necessary or reasonable continuance." IAD art. IV(c), App. 4a. Article V of the Agreement further provides that "in the event that an action on the indictment . . . on the basis of which the detainer

has been lodged is not brought to trial within the period provided in . . . article IV of this agreement, the appropriate court . . . *shall enter an order dismissing the same with prejudice*." IAD art. V(c), App. 49a (emphasis added).

"Adoption of the [IAD] was motivated in part by a practice of filing detainers based on untried criminal charges that had little basis. . . . Even though unsubstantiated, the detainers would have a detrimental effect on the prisoner's treatment." *Carchman* v. *Nash*, 473 U.S. 716, 729-30 (1985). To remedy this problem, the Agreement simplified the mechanisms by which authorities in a charging state could obtain a prisoner for trial, but simultaneously imposed "important limitations . . . on prosecuting authorit[ies]," *United States* v. *Mauro*, 436 U.S. 340, 352 (1978), most notably the speedy trial requirement of Article IV. As this Court has made clear, that requirement must be strictly enforced, otherwise "the Government [could] gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action." *Id.* at 364. See also *Stroble* v. *Anderson*, 587 F.2d 830, 838 (6th Cir. 1978) (IAD "cannot appropriately be turned from a shield for the defendant into a sword for the prosecution").

In this case, it is undisputed that petitioner was not even properly *indicted* within the time period specified in Article IV(c). App. 14a. The state secured his presence in Oregon pursuant to an indictment that it knew was patently unconstitutional under Oregon law, because the prosecutor had excused one of the seven grand jurors constitutionally required to return a valid indictment. *Id.* In response to petitioner's successful motion to quash, and recognizing that the time period within which to try petitioner was about to expire, the state, over objection, sought and received a 30-day "good cause" ex-

tension within which to secure a proper indictment.[8] The only "good cause" the state claimed was that it needed "to resubmit [the] matter to the grand jury." Exh. 113 at 52. Petitioner ultimately was convicted on the basis of that indictment. The Ninth Circuit, on *de novo* review, found that Oregon had established the requisite "good cause" and thus that the 30-day extension had been properly granted. App. 16a.

The Ninth Circuit's decision is the first to hold that a superseding indictment can, through any mechanism, toll the IAD's speedy trial deadline. It is entirely inconsistent with both the terms and expressed purposes of the Agreement. See, *e.g.*, IAD art. I, App. 43a-44a ("the purpose of this agreement [is] to encourage the expeditious and orderly disposition of [outstanding] charges"); *Fex* v. *Michigan*, 113 S. Ct. 1085, 1092 (1993) (Blackmun, J., dissenting) ("The IAD's primary purpose is not to protect prosecutors, or even to protect prosecutions, but to provide a swift and certain means for resolving the uncertainties and alleviating the disabilities created by outstanding detainers"). If allowed to stand, the decision below will permit states within the Ninth Circuit to violate their contractual obligations to their sister states, as well as the statutory rights of prisoners, merely by dismissing the indictment under which the prisoner was obtained and seeking an extension of time within which to secure another indictment. They will be able to do so even where, as here, they have full knowledge, *ab initio*, that the original indictment is entirely deficient. Because the Ninth Circuit's holding so radically misinterprets the IAD, it is in conflict with a decision of the Second Circuit, as well as the decisions of both of the state courts to address the

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[8] Petitioner not only objected to the state's motion for a "good cause" extension, but also filed a motion to compel his return to Washington and a motion to dismiss the indictment on which he ultimately was convicted with prejudice because it was untimely. Both of those motions were denied. Appellant's Brief before 9th Circuit at 28 (filed Sept. 23, 1992).

issue. Those courts have held that a new indictment does *not* extend the time period within which a prisoner must be tried under the IAD. The decision also conflicts with the decisions of two courts of appeals and the Supreme Court of Colorado holding that similar delays do not provide grounds for "good cause" extensions of time.

a. The Ninth Circuit's decision conflicts with decisions of the Second Circuit and courts in New Mexico and New York holding that a superseding indictment or other instrument does not extend the IAD's time limits. In *United States* v. *Cephas*, 937 F.2d 816, 821 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 884 (1992), the Second Circuit flatly rejected the Government's contention that the "detainer clock automatically stopped ticking" when the original charges against a prisoner were dismissed, and held that "the government cannot lodge a detainer against the defendant and then throw out the clock every time it dismisses charges, only to start the clock anew by bringing a new set of charges."

Likewise, in *People* v. *C'Allah*, 474 N.Y.S.2d 305, 306 (N.Y. App. Div. 1984), the Supreme Court of New York permitted a prisoner who was not brought to trial within the specified time period to withdraw a guilty plea, holding that "[t]he People may not avoid operation of the time limitations prescribed in [the IAD] simply by the expedient of procuring another indictment, whether it arises out of the discovery of new evidence or otherwise." And in *New Mexico* v. *Shaw*, 651 P.2d 115, 118 (N.M. Ct. App. 1982), the court "decline[d] to subvert the unmistakable meaning of the various provisions of the Agreement by holding that a second indictment . . . can avoid the time restrictions" of the IAD. Indeed, the court held that "[t]o espouse a view that . . . reindictment begins [the time period] over again, would make a farce of the entire design and objectives of the Agreement." *Id.* at 119. The Ninth Circuit's decision that the need to secure a superseding indictment constituted "good cause" for tolling peti-

tioner's right to a speedy trial under Article IV simply cannot be squared with these decisions.

b. The Ninth Circuit's decision also conflicts with the decisions of the Second and Fifth Circuits and a number of state courts holding that delays occasioned by administrative snafus do not constitute "good cause" sufficient to toll the IAD's deadlines. In *Birdwell* v. *Skeen*, 983 F.2d 1332, 1340 (5th Cir. 1993), the court held that "[a] continuance which is granted to allow a party to ascertain whether testimony is necessary for a . . . hearing is not based upon good cause when the party requesting the continuance could have made that determination prior to the hearing by using reasonable diligence." Likewise, in *United States* v. *Ford*, 550 F.2d 732, 743 (2d Cir. 1977), the court held that a crowded court docket did not constitute " 'good cause' " for delay. And in *People* v. *Allen*, 744 P.2d 73, 77 (Colo. 1987), the Supreme Court of Colorado, reasoning that "[t]he burden of satisfying the speedy trial requirements of the IAD [is] on the prosecutor and the trial court," and that "the purpose of the Agreement requires that the adverse consequences of official oversights be visited upon the prosecution, not upon the prisoner," dismissed the charges against a prisoner with prejudice where the state exceeded the 120-day time limit through an administrative mix-up. These cases stand squarely for the proposition that even legitimate administrative problems do not constitute good cause for delay, and cannot be reconciled with the Ninth Circuit's holding that the need to secure a superseding indictment, occasioned by the bad faith of the prosecutor in securing the original indictment, provides a sound basis for delay.

Accordingly, the decision below raises two separate conflicts among the lower courts with respect to the proper interpretation and application of the IAD. This inconsistency in the approach to a fundamental law regulating the treatment of prisoners warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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